In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 129

ARLO C. CRANCE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is reported at 214 F. Supp. 792. The opinion of the court of appeals is reported at 341 F. 2d 161.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1965. The petition for a writ of certiorari was filed on May 11, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' claims for enhanced valuation of their property were properly rejected because

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the lands were "likely to be taken" for a federal dam and reservoir project at the time of the government's initial commitment to the project.

2. Whether the government was estopped to deny liability for increased value of the property.

3. Whether the district court's instructions regarding "special benefits" were correct.

STATEMENT

On August 4, 1961, the United States condemned fee title to 35 acres of land belonging to the Crance estate for use in the Pomme de Terre Dam and Reservoir Project in Missouri (R. 1–5).[1] The land was taken for use as a public access and recreational area abutting the reservoir (Gov't Ex. 8, plate 4).[2] The district court ordered a pretrial hearing to determine if, under the rule of *United States* v. *Miller*, 317 U.S. 369, the land was within the scope of the Pomme de Terre Project at the time the United States became committed to it. After a hearing (R. 8–120), the court concluded that 28.82 acres were not within the scope of the project, and that the United States was estopped to contend that the remaining 6.18 acres were within the scope of the project (Pet. App. A2). Accordingly, the court directed that the 35

[1] "R." refers to the printed record on appeal.

[2] Pomme de Terre was one of a group of Missouri River Basin projects approved by the Act of June 28, 1938, c. 795, 52 Stat. 1215, 1218. Funds were appropriated for Pomme de Terre by the Acts of July 2, 1956, Pub. L. 641, 70 Stat. 474, 480, and September 2, 1960, Pub. L. 86-700, 74 Stat. 743, 744. See also, the Act of December 22, 1944, c. 665, sec. 4, 58 Stat. 887.

acres be valued as of the date of taking, and that the valuation include appreciation due to the project (R. 121).[3] The court of appeals reversed, holding that petitioners were not entitled to the enhanced value (Pet. App. A17–A28).

The evidence may be briefly summarized as follows: Plans for a dam and reservoir project of this kind are tentatively prepared by the District Director of the Corps of Engineers. They are then submitted to the Division Engineer for review, and finally to the Chief of Engineers for modification, rejection, or approval, which may be qualified or conditional (see Gov't Ex. 1, pp. 7–8, 2d indorsement). A general plan for the Pomme de Terre Project was drafted in April 1953 (Gov't Ex. 1). Under the land acquisition policy in effect at that time, the bed of the reservoir was to be blocked out in 40-acre tracts up to the "full flood pool reservoir line,"[4] and any 40-acre tract wholly or partially within this line was to be taken in fee. Consequently, 40 acres of petitioners' complete tract of 132 acres were initially scheduled for fee acquisition (Gov't Ex. 3). In October 1953, the Chief of Army Engineers established a new acquisition policy, whereby fee title was to be taken only to

[3] At the subsequent trial to determine just compensation, the jury awarded $17,500 for the taking and the district court entered judgment in that amount (R. 154–157). Sales of other lands in the area indicated an enhancement of 500% between 1959 and 1961, and 200% from September 1961 to January 1962 (R. 124–127).

[4] "Full flood pool reservoir line" is the line which represents the greatest height to which the pool can rise (R. 22–27, 168–172).

property flooded within a five-year period, and flowage easements were to be taken for the remaining land up to the "flood pool line" (R. 21–26, 168–173; Gov't Ex. 4). Under this new policy, it was first proposed to take 6.25 acres of petitioners' property in fee and 7 acres of flowage easement, and then, as a result of more accurate engineering data, the acreage to be acquired was reduced to 5 acres in fee and 2.07 acres of flowage easement (R. 30–31; Gov't Ex. 5, pp. v–3—v–5, plates 1, 2, 4; Gov't Ex. 6; Gov't Ex. 9). This latter acreage was obtained by voluntary purchase on October 10, 1958 (R. 101). The 35 acres in question here represent the balance of the 40-acre tract that was originally scheduled for acquisition.

Incidental to the construction of a reservoir, it was proposed from the outset to provide recreational facilities around the reservoir for public use (Gov't Ex. 1, p. 33; Gov't Ex. 5, pp. v–8—v–11). By December 1956, eight such areas were under consideration (Gov't Ex. 5, pp. 8–9, 4th indorsement). In June 1960, when the project was about 67 percent complete and about 82 percent of the real estate had been acquired, the Corps of Engineers, in accordance with its usual policy, publicly announced that it had developed tentative plans for public use areas (which did not include the land at issue here), and it invited public comment and suggestions (R. 43–45, 64–66; Gov't Ex. 8, App. I; Gov't Ex. 10A, p. 5, par. 6). As a result of suggestions received at this public meeting and of a public petition, additional sites were inspected. The 35 acres involved here were then selected as a public use area (Gov't Ex. 8, p. 11, par. h, plates 2, 4, 15, 1st indorsement, pp. 2–3).

The district court held that the scope of the project, for purposes of excluding enhancement in value resulting from it, was determined by the plans of July 2, 1956, the date of approval of the Act appropriating funds for the project (Pet. App. A3). The court of appeals held that the access and recreational areas were always an integral part of the project and that petitioners' property was in an area where it was likely to be acquired for such purposes (Pet. App. A21–22).

ARGUMENT

The court of appeals correctly applied the well-established standard articulated by this Court in *United States* v. *Miller*, 317 U.S. 369, 379, to the particular facts of this case. There is no conflict among circuits, and no issue warranting consideration by this Court is presented.

1. It is clear from the decisions of this Court that the United States is not obliged to pay enhanced value for condemned property when the enhancement is created by the very project for which the land is needed. *Shoemaker* v. *United States*, 147 U.S. 282, 303–305; *United States* v. *Miller*, *supra*, at 376–379; cf. *United States* v. *Cors*, 337 U.S. 325, 332–334. When property is taken in more than one stage, the applicable test for determining whether value for a later taking must include enhancement produced by the earlier taking is whether the later-condemned lands were "within the area where they were likely to be taken for the project." *United States* v. *Miller*, *supra*, at 379.

On the undisputed facts here,[5] the court of appeals concluded (Pet. App. A27): "The property condemned was taken during construction from an area of probable acquisition for fulfillment of a recreational purpose which was within the scope of the project from its inception." The court was, accordingly, required by the principles of the *Miller* decision to deny petitioners' demand for enhanced valuation.

The district court based its contrary decision on the fact that the project plans on the date of appropriation did not specifically delineate petitioners' property. But such a limited application of the *Miller* rule overlooks the principles upon which that decision rests. As the Court observed in *Miller*, the underlying issue is whether the increase in value "could only arise from speculation by * * * possible purchasers * * * as to what the Government would be compelled to pay as compensation." 317 U.S. at 377. When, as here, it has been definitely determined at the outset that property adjacent to what has been taken will also be required and it is uncertain which of the neighboring parcels will be selected, the appreciation in value is largely due to the government-inspired speculation which the *Miller* decision sought to make irrelevant in determining value. As the court of appeals observed (Pet. App. A22–A23), final approved plans for the basic reservoir area did not exist

[5] Contrary to petitioners' contentions (Pet. 21–24), the court of appeals did not set aside findings of fact. It did precisely what this Court did in *United States* v. *Miller*, *supra*, in that it reached conclusions on the basis of undisputed facts in the record.

on the date selected by the district court, and it was considerably later that final approval was given to plans for access and recreational areas. Hence, it was proper to deny petitioners any increase in the value of their property notwithstanding the fact that their lands were not specifically mentioned in the initial proposals.

Nor is there any merit to the suggestion that the government is gaining by indecisiveness and delay (Pet. 13, 16). The record in this case establishes that the project was planned and constructed in an orderly and expeditious fashion. Petitioners are merely seeking better treatment than was accorded to those whose property was taken in an earlier stage of the same project.

2. There is no merit to petitioners' claim that the United States is estopped to contest an enhanced valuation of 8.25 acres of the condemned land (Pet. 17). Even if the government were subject to ordinary estoppel principles (cf. *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384), there is, as the court of appeals observed, no evidence in the record that petitioners consummated the voluntary sale in 1958 in reliance upon any representation by a government agent that if more land was needed from the Crance estate, the government would pay enhanced value.

3. The district court instructed the jury that petitioners' award should be reduced by the value of "special benefits" accruing to their remaining property as a result of the improvement attributable to the project. In defining "special benefits," the court said that

these are benefits which "* * * are not enjoyed generally by other tracts of land in the neighborhood, no portion of which land is taken for said public access area, * * *" and instructed the jury that "* * * if you find that the benefits of the access area are general to the larger area of land in that vicinity or to the public generally, they would be public or general benefits and not special benefits" (Pet. App. A29). In *United States* v. *River Rouge Co.*, 269 U.S. 411, 416, this Court, quoting from *Allen* v. *Charlestown*, 109 Mass. 243, 246, observed that benefits do not become general simply "because other estates upon the same street are benefited in a similar manner." Courts of appeals have agreed that a special benefit is not to be so narrowly defined. *United States* v. *2,477.79 Acres of Land in Bell County*, 259 F. 2d 23, 28 (C.A. 5); *Aaronson* v. *United States*, 79 F. 2d 139, 141 (C.A. D.C.). The court of appeals was, therefore, correct in characterizing the instruction as "inaccurate."

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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